IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 16574 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI
and
HONOURABLE MS. JUSTICE SANGEETA K. VISHEN

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1	Whether Reporters of Local Papers may be allowed to see the judgment?	**YES**
2	To be referred to the Reporter or not?	**YES**
3	Whether their Lordships wish to see the fair copy of the judgment?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?	**NO**

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SHEETAL INFRASTRUCTURE PRIVATE LIMITED
Versus
ASST. COMMISSIONER OF INCOME TAX, CIRCLE 4(1)(1)

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Appearance:
MR B S SOPARKAR(6851) for the Petitioner(s) No. 1
MRS MAUNA M BHATT(174) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MS. JUSTICE SANGEETA K. VISHEN

Date : 01/10/2019

ORAL JUDGMENT
(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By this petition under article 226 of the Constitution of India, the petitioner has challenged the notice dated 13.03.2018 issued by the respondent under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), whereby, the respondent seeks to reopen the assessment of the petitioner for assessment year 2011-12.

2. The facts giving rise to this petition are that the petitioner is a private limited company engaged in the business of real estate development. The petitioner filed its return of income for assessment year 2011-12 on 29.09.2011 declaring its total income at Rs.4,00,82,629/- and book profit at Rs.7,56,37,396/-. The case was selected for scrutiny and an assessment order came to be passed under section 143(3) of the Act on 18.03.2014, assessing the income of the petitioner at Rs.4,26,43,229/- and book profit at Rs.7,81,97,996/-.

2.1 Subsequently, the Assessing Officer issued the impugned notice dated 13.03.2018 under section 148 of the Act, reopening the assessment of the petitioner for assessment

year 2011-12. Later on, by a letter dated 10.07.2018, the reasons for reopening the assessment came to be furnished to the petitioner. By a letter dated 14.09.2018, the petitioner raised objections against the reopening of assessment on merits and requested the respondent to drop the re-assessment proceedings. However, by a letter dated 05.10.2018, the respondent rejected the objections. The petitioner has, therefore, presented the present petition challenging the impugned notice as well as the order passed by the respondent rejecting the objections filed by the petitioner.

3. Mr. B. S. Soparkar, learned advocate for the petitioner, invited the attention of the court to the reasons recorded for reopening the assessment to submit that the reasons recorded are factually incorrect. It was submitted that at the time of scrutiny assessment, the petitioner had given the correct facts; however, the reopening is based on incorrect facts. It was pointed out that in this case the date of approval of the housing project is 06.02.2008 and not 16.03.2005 as referred to in the reasons recorded. It was submitted that the Assessing Officer has wrongly come to the conclusion that the petitioner had furnished concocted documents on the basis of which the

then Assessing Officer had allowed the deduction under section 80IB(10) of the Act for the assessment year under consideration.

3.1 It was further submitted that the reopening of assessment is based upon a mere change of opinion as during the course of scrutiny assessment, the Assessing Officer had called for the record from Gandhinagar Urban Development Authority (hereinafter referred to as 'the GUDA') and formed an opinion and thereafter, had allowed deduction under section 80IB(10) of the Act. It was further submitted that the approval granted on 06.02.2008 by the GUDA is the only approval for housing project and hence, the reasons recorded for reopening the assessment are based on wrong facts. It was urged that reasons lack validity and that, no income chargeable to tax has escaped assessment.

3.2 It was further submitted that this is a case where a scrutiny assessment has been made for the assessment year under consideration; the impugned notice has been issued on 13.03.2018 for reopening the assessment for assessment year 2011-12, which is clearly beyond a period of four years from the end of the relevant assessment year, and hence, the first

proviso to section 147 of the Act would be attracted. It was submitted that a bare perusal of the reasons recorded indicates that there is not even a whisper regarding any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment. Therefore, the assumption of jurisdiction on the part of the respondent is without any authority of law. It was accordingly urged that the impugned notice under section 148 of the Act, deserves to be quashed and set aside.

4. Vehemently opposing the petition, Ms. Mauna M. Bhatt, learned Senior Standing Counsel for the respondent submitted that in this case, initially the approval for the project was granted on 16.05.2005 by the local authority namely the Kudasan Gram Panchayat, which is the first approval. However, the approval on the basis of which the petitioner has sought deduction under section 80IB(10) of the Act is a revised approval granted by the GUDA on 06.02.2008. Referring to the provisions of section 80IB(10) of the Act, it was submitted that the Explanation thereto provides that in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the

building plan of such housing project is first approved by the local authority. It was submitted that the local authority having first approved the plan on 16.05.2005, the housing project is required to be deemed to be approved on that date and accordingly the entitlement to the benefit under section 80IB(10) of the Act has to be computed by considering the date of approval as 16.05.2005. It was submitted that the completion date has to be computed from the date of initial approval and what is to be considered is the first approval; whereas, in this case, the first approval has been given in 2005 and hence, the petitioner would be entitled to get deduction under section 80IB (10) of the Act, provided it completes the project within a period of four year from the date of initial approval. It was submitted that in this case admittedly the B.U. Permission was granted by the GUDA on 31.03.2012 and hence, the petitioner had not fulfilled the condition stipulated under sub-clause (ii) of clause (a) of section 80IB (10) of the Act, and hence, the petitioner was not entitled to deduction thereunder.

4.1 Reliance was placed upon the decision of this court in the case of ***Commissioner of Income Tax v. Radhe Developers***, *[2012] 341 ITR 403 (Guj)*, wherein the court held

that the assessees were entitled to the benefit under section 80IB(10) of the Act even where the title of the lands had not passed on to the assessees and in some cases, the development permissions may also have been obtained in the name of the original land owners. It was submitted that though the petitioner was not the owner of the land when the initial permission came to be granted, it is the first permission obtained by Sheetal Developers which is required to be taken into consideration for the purpose of considering the eligibility for deduction under section 80IB (10) of the Act. It was further submitted that there are documents on record to suggest that there are two permissions in respect of the land on which the project has been constructed and that there was failure on the part of the petitioner to disclose the first approval in the Form 10CC which only shows the approval that was granted in the year 2008. It was submitted that in this case, there is no question of change of opinion on the part of the respondent inasmuch as the Assessing Officer at the time of scrutiny assessment has not verified these documents. It was, accordingly, submitted that in the facts and circumstances of the present case, the Assessing Officer was wholly justified in assuming jurisdiction under section 147 of the Act and that, there is no warrant for interference by this

court.

5. In rejoinder, Mr. B. S. Soparkar, learned advocate for the petitioner submitted that in this case, the first scheme was floated by Sheetal Developers which was Vedika-I, whereas, the present scheme is Vedika-E series which is a completely different project. Referring to the Raja Chitthi/Permission granted by the Kudasan Gram Panchayat, it was pointed out that it was granted in respect of Vedika-I to Sheetal Developers; whereas Form 10CCB submitted by the petitioner relates to the project named Vedika-E series. It was pointed out that the Building Use Permission has been granted in respect of Vedika-E series. It was submitted that insofar as the approval of residential housing project is concerned, the first approval was granted on 06.02.2008 and that insofar as the use of the word 'revised' in the approval granted to the petitioner in the year 2008 is concerned; it is in the context of land and not *qua* the approval of the project. It was submitted that the decision of this court in the case of *Commissioner of Income-tax v. Radhe Developers* (*supra*) would not be applicable in the facts and circumstances of the present case. It was submitted that in this case, Sheetal Developers and the present petitioner are two different assessees and the two

plans submitted by them are different. Insofar as the first plan submitted by Sheetal Developers in the year 2005 is concerned, such plan was not eligible for the benefit of section 80IB(10) of the Act. The attention of the court was invited to the fact that in the subsequent year, the Assessing Officer had disallowed the claim under section 80IB(10) on the very same ground, against which the petitioner had approached the Commissioner of Income Tax (Appeals) who had set aside the disallowance made by the Assessing Officer against which, the revenue has approached the Tribunal. It was, accordingly, urged that this is a clear case of change of opinion and in any case, on the reasons recorded by the Assessing Officer, he could not have formed the belief that the income chargeable to tax has escaped assessment.

6. Since the controversy involved in the present case relates to the eligibility or otherwise of the petitioner to get deduction under section 80IB(10) of the Act in respect of its housing project, it may be germane to refer to sub-section (10) of section 80IB of the Act, which as it stood at the relevant time, reads as under:

> ***"80-IB. Deduction in respect of profits and gains from certain industrial undertakings other than***

infrastructure development undertakings.— *(1) Where the gross total income of an assessee includes any profits and gains derived from any business referred to in sub-sections (3) to (11), (11-A) and (11-B) (such business) being hereinafter referred to as the eligible business), there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to such percentage and for such number of assessment years as specified in this section.*

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(10) The amount of deduction in the case of an undertaking developing and building housing projects approved before the 31st day of March, 2008 by a local authority shall be hundred per cent of the profits derived in the previous year relevant to any assessment year from such housing project if,—

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998 and completes such construction,—

(i) in a case where a housing project has been approved by the local authority before the 1st day of April, 2004, on or before the 31st day of March, 2008;

(ii) in a case where a housing project has been, or, is approved by the local authority on or after the 1st day of April, 2004 but not later than the 31st day of March, 2005, within four years from the end of the financial year in which the housing project is approved by the local authority.

(iii) in a case where a housing project has been approved by the local authority on or after the 1st day of April, 2005, within five years from the end of the financial year in which the housing project is approved by the local authority.

Explanation.—For the purposes of this clause,—

(i) in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building

plan of such housing project is first approved by the local authority;

(ii) the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority;

(b) the project is on the size of a plot of land which has a minimum area of one acre:

Provided that nothing contained in clause (a) or clause (b) shall apply to a housing project carried out in accordance with a scheme framed by the Central Government or a State Government for reconstruction or redevelopment of existing buildings in areas declared to be slum areas under any law for the time being in force and such scheme is notified by the Board in this behalf;

(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the city of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place;

(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed three per cent of the aggregate built-up area of the housing project or five thousand square feet, whichever is higher.

(e) not more than one residential unit in the housing project is allotted to any person not being an individual; and

(f) in a case where a residential unit in the housing project is allotted to a person being an individual, no other residential unit in such housing project is allotted to any of the following persons, namely:—

(i) the individual or the spouse or the minor children of such individual,

(ii) the Hindu undivided family in which such individual is the karta,

(iii) any person representing such individual, the spouse or the minor children of such individual or the Hindu undivided family in which such individual is the karta;

Explanation.—For the removal of doubts, it is hereby declared that nothing contained in this sub-section shall apply to any undertaking which executes the housing project as a works contract awarded by any person (including the Central or State Government).”

7. Thus, under sub-section (10) of section 80IB of the Act, an assessee is entitled to deduction of hundred per cent of the profits derived from developing and building a housing project which has been approved by the local authority. Evidently, therefore, the approval obtained by the assessee must be for a housing project. Moreover, if such approval has been obtained on or after the 1st day of April, 2004 but not later than the 31st of March, 2005, such project has to be completed within four years from the end of the financial year in which such housing project is approved, and in case such approval has been obtained on or after the 1st day of April, 2005, to be eligible for deduction under section 80IB(10) of the Act, the assessee has to complete the housing project within five years from the end of the financial year in which the housing project is approved by the local authority.

8. In the aforesaid statutory backdrop, the core question that arises for consideration in the present case is as to on which date such approval can be said to have been granted by

the local authority. It is the case of the respondent Assessing Officer that such approval was granted by the Kudasan Gram Panchayat on 16.03.2005, whereas it is the case of the petitioner that such approval was granted by the GUDA on 06.02.2008. In case the approval was granted on 16.03.2005, the housing project would have to be completed within four years from the end of the financial year 2005 and since the building use permission had been granted on 31.03.2012, the petitioner would not be entitled to deduction under section 80IB(10) of the Act. However, if such approval was granted on 06.02.2008, the housing project can be said to have been completed within the time allowed under clause (a)(iii) of section 80IB(10) of the Act entitling the petitioner to deduction under section 80IB(10) of the Act.

9. In the present case, the first approval was granted by way a Raja Chitthi (Permission) by the Kudasan Gram Panchayat in favour of Sheetal Developers on an application dated 16.03.2005 made in respect of a scheme called Vedika-I, whereby, approval was granted for construction of an office. In the said Raja Chitthi, it has also been recorded that the land has been converted for non-agricultural purpose. Thus, by virtue of the said Raja Chitthi, the Kudasan Gram Panchayat

had granted approval for construction of an office. It appears that Sheetal Developers had floated a residential scheme being Vedika-I comprised of several residential plots with provision of internal roads, margin, common plot and the above referred approval was obtained from the Kudasan Gram Panchayat for construction of an office building for such scheme. Thus, Vedika-I appears to be a scheme for residential plots wherein, individual plots were sold to individuals. Thereafter, the petitioner company, which came to be incorporated on 11.01.2005, has purchased plots which formed part of the Vedika-I scheme from certain parties and thereafter, floated a housing project being Vedika-E series. The approval for such housing project was obtained from GUDA on 06.02.2008. However, the approval given by GUDA is in the nature of a revised plan showing residential and commercial building layout on Block No.529/A/P, OP/FP No.89 TPS No.03 (Kudasan). Since the approval is termed as a revised plan, according to the Assessing Officer, in view of the Explanation to clause (a) of sub-section (10) of section 80IB of the Act, which provides that in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first

approved by the local authority, the approval granted by the Kudasan Gram Panchayat on 16.03.2005, is the first approval and hence, the housing project is deemed to have been approved on that date, and consequently, the petitioner was required to complete the project within a period of four years from the end of the financial year in which such approval was granted. However, the project having been completed on 31.03.2012, the condition precedent for availing the benefit under section 80IB(10) of the Act was not satisfied and hence, the petitioner was not entitled to deduction of Rs.3,50,78,040/- under section 80IB(10) of the Act. Therefore, the Assessing Officer seeks to reopen the assessment of the petitioner for the assessment year under consideration.

10. In this regard, a perusal of the approval granted on 16.03.2005 by the Kudasan Gram Panchayat, makes it abundantly clear that such approval was only granted for construction of an office building and not for developing and building a housing project. For the first time, approval for a housing project on the subject land came to be granted only on 06.02.2008 by the GUDA. While in the approval, such plan is referred to as a revised plan, as rightly pointed out by the learned advocate for the petitioner, it is the practice of the

urban development authority to refer to any subsequent approval granted in respect of any land as a revised plan. Since, in the present case, earlier a project for residential plots was approved and approval was granted on 16.03.2005 in respect of an office building, in the subsequent approval granted to the petitioner in respect of the subject land for a housing project, the plan is referred to as a revised plan. Nonetheless, from the facts as emerging from the record, it is manifest that insofar as approval for a housing project in respect of the subject land is concerned, such approval was granted for the first time on 06.02.2008. The Explanation to clause (a) of section 80IB(10) of the Act provides that in a case where the approval in respect of the housing project is obtained more than once, such housing project shall be deemed to have been approved on the date on which the building plan of such housing project is first approved by the local authority. In the present case, approval in respect of housing project is obtained for the first time on 06.02.2008 and hence, that is the relevant date for considering the eligibility for deduction under section 80IB(10) of the Act. It is an admitted position, as reflected in the reasons recorded for reopening the assessment, that the project was completed on 31.03.2012, which is well within the period prescribed for

completion of the project for the purpose of availing the benefit of deduction under section 80IB(10) of the Act. Since the previous approval granted by the Kudasan Gram Panchayat was not for a housing project, the decision of this court in ***Commissioner of Income-tax v. Radhe Developers*** *(supra)*, would have no applicability to the facts of the present case.

11. Another aspect of the matter is that in the present case, an assessment under section 143(3) of the Act came to be framed by the Assessing Officer allowing the deduction claimed under section 80IB(10) of the Act. The impugned notice has been issued on 13.03.2018, in respect of assessment year 2011-12, which is clearly beyond a period of four years from the end of the relevant assessment year. Therefore, the first proviso to section 147 of the Act would be attracted and for the purpose of assuming jurisdiction under section 147 of the Act by the Assessing Officer, there has to be failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the assessment year under consideration. The facts reveal that the petitioner had duly furnished the approval dated 06.02.2008 granted by the GUDA for the housing project; however, the Assessing

Officer, in the reasons recorded has termed such approval as a fictitious document on the ground that the original approval was granted on 16.03.2005. As noted herein above, the approval dated 16.03.2005 granted by the local authority was for an office building and not a housing project and hence, not submitting the same at the time of the scrutiny assessment cannot in any manner be termed as non-disclosure of relevant facts necessary for the assessment. Under the circumstances, in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment, the Assessing Officer has failed to cross the first threshold for assuming jurisdiction under section 147 of the Act, beyond a period of four years from the end of the relevant assessment year.

12. Besides, even on merits, since the permission dated 06.02.2008 was the first approval granted for a housing project on the subject land, there is no material on the basis of which the Assessing Officer could have formed the belief that income chargeable to tax has escaped assessment. The impugned notice dated 13.03.2018 issued by the respondent under section 148 of the Act, therefore, cannot be sustained.

13. For the forgoing reasons, the petition succeeds and is accordingly, allowed. The impugned notice dated 13.03.2018, issued by the respondent under section 148 of the Income Tax Act for assessment year 2011-12 as well as all proceedings pursuant thereto, are hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.

[Harsha Devani, J.]

[Sangeeta K. Vishen, J.]

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